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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 869

NATIONAL BISCUIT DIVISION (BISCUIT COUNCIL, BAKERY AND CONFECTIONERY WORKERS' INTERNATIONAL UNION OF AMERICA), as bargaining agent and contractual representative of certain employees of the National Biscuit Company, *Petitioner*

v.

BOYD LEEDOM (CHAIRMAN), PHILIP RAY RODGERS, STEPHEN S. BEAN, JOSEPH A. JENKINS, and JOHN H. FANNING, individually and as members of the National Labor Relations Board, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

National Biscuit Division (Biscuit Council, Bakery and Confectionery Workers' International Union of America) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on January 29, 1959.

OPINION BELOW

The United States District Court for the District of Columbia dismissed the complaint on July 17, 1958, without opinion (J.A. 232).[1] The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, pp. 10a-12a, has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1959 (infra, p. 13a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board, despite the statutory command that it apply "the same regulations and rules of decision * * * irrespective of the identity of the persons" before it in a representation proceeding (section 9(c)(2) of the National Labor Relations Act, 29 U.S.C. 159(c)(2), infra, pp. 3-4, 7a), may nevertheless take into consideration the identity of a labor organization so that the Board will direct an election during a contract term *solely* because the contractual bargaining agent is affiliated with a union expelled from the AFL-CIO.

2. Whether the Labor Board's rule, that the existence of a question concerning representation may depend solely upon expulsion action taken by the AFL-CIO—since, but for the fact of expulsion, concededly no question concerning representation would exist under the Board's rule—is not in itself an un-

[1] References herein to J.A. are to the Joint Appendix prepared for the use of the Court of Appeals.

lawful delegation of Board authority to a private organization, namely, the AFL-CIO.

3. Whether this Board rule does not depart from statutory requirements and from constitutional requirements of due process (see *Inland Empire District Council, etc.* v. *Millis*, 325 U.S. 697, 700) and deprive the contractual collective bargaining agent of a right assured to it by Congress so as to give a district court "jurisdiction of an original suit to prevent deprivation of [the] right so given". (*Leedom* v. *Kyne*, 358 U.S. 184, 189).

4. Whether the Board may abrogate, prior to its expiration date, an existing 17-plant collective bargaining agreement which is not contrary to any policy of the National Labor Relations Act and which the existing bargaining agent is willing and able to administer in accordance with the Act.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The pertinent portion of the Fifth Amendment to the Constitution provides:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *."

Section 9(c)(2) of the National Labor Relations Act, as amended by the Labor-Management Relations Act, 1947 (Act of July 5, 1935, 49 Stat. 449, as amended by the Act of June 23, 1947, 61 Stat. 136), 29 U.S.C. 159(c)(2), provides in pertinent part:

> "In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply ir-

respective of the identity of the persons filing the petition or the kind of relief sought * * *."

Other pertinent provisions of the National Labor Relations Act and section 10 of the Administrative Procedure Act (Act of June 11, 1946), 60 Stat. 243, 5 U.S.C. 1009, are set out in Appendix A, infra, pp. 1a-9a.

STATEMENT

Petitioner is affiliated with the Bakery and Confectionery Workers' International Union of America (herein called "BCW") and is a labor organization within the meaning of section 2(5) of the National Labor Relations Act (herein called the "Act"), 29 U.S.C. 152(5). (J.A. 2, 50-51, 57-59). Since at least 1954 petitioner has been the exclusive collective bargaining representative of approximately 10,000 employees of the National Biscuit Company (herein called "Nabisco") at 17 Nabisco biscuit and cracker plants throughout the United States. Petitioner's current collective bargaining agreement with Nabisco (J.A. 69-197) covering such employees became effective as of September 1, 1957, and expires August 31, 1959 (J.A. 6, 108).

Commencing in December 1957 certain former officers and members of BCW locals in Atlanta, Georgia, Cambridge, Massachusetts, Buffalo, New York, and Philadelphia and York, Pennsylanvia, seized the assets and facilities of those locals and purported to disaffiliate or secede from the BCW (J.A. 7-8). In each such case, the seceding members appropriated the identifying number of the local union involved and

thereafter represented that the local had become affiliated with a new organization known as the American Bakery and Confectionery Workers' International Union (herein called "ABC") (J.A. 8).

Shortly thereafter these ABC locals petitioned the National Labor Relations Board (herein called the "Board") to conduct representation elections among the Nabisco employees in their respective areas, notwithstanding the existence and terms of the current contract between petitioner and Nabisco (J.A. 8). The Board thereupon instituted hearings and proceedings pursuant to Section 9(c) of the Act (29 U.S.C. 159(c)) to determine whether bona fide questions of representation existed within the meaning of the Act (J.A. 9). Petitioner and Nabisco appeared at these hearings. Petitioner took the position at each hearing that its contract with Nabisco was valid in all respects and therefore was a bar to representation proceedings, and that, in any event, the only appropriate unit was the contractual single unit comprising employees at all 17 Nabisco biscuit and cracker plants (J.A. 9). Nabisco itself took the position that it was bound by the agreement covering all its biscuit and cracker plants and urged the Board to treat that agreement as a bar to elections (J.A. 63-66).

The Board nevertheless, on June 30, 1958, found petitioner's Nabisco contract no bar and directed separate representation elections to be held within 30 days among the Nabisco employees in Cambridge, Massachusetts, Buffalo, New York, Atlanta, Georgia, and Philadelphia and York, Pennsylanvia (J.A. 10, 17-27). In so doing, the Board referred to the BCW's expul-

sion from the AFL-CIO and concluded that "a schism exists in Local 431 of the Bakery Workers which affects the Buffalo plant unit included in the master agreement. Therefore, that contract is no bar to the requested election. *International Harvester Company, East Moline Works*, 108 NLRB 600, ftn. 11." (J.A. 18).[2]

Petitioner thereupon brought this action in the United States District Court for the District of Columbia, against the respondents individually and as members of the Board, to declare the respondents' action unlawful and for injunctive relief. The complaint alleged that the June 30 Decisions and Directions of Elections violated the Act and particularly section 9(c)(2) thereof in that respondents had applied rules of decision against petitioner different from the Board's usual rules solely because of petitioner's affiliation with BCW, an International Union which had been expelled by the AFL-CIO (J.A. 13). The complaint further alleged, *inter alia*, that the effect of respondents' decisions, based as they were upon the fact of the BCW's expulsion by the AFL-CIO, was to delegate to the AFL-CIO and its affiliate, the ABC, the Board's statutory authority to determine the existence of a question concerning representation affecting commerce within the meaning of section 9 of the Act (J.A. 13-14). It alleged that a further result of respondents' decisions was to destroy peti-

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[2] The Board incorporated this ruling in the Buffalo, N. Y. case by reference in each of the other Wabisco decisions, and physically attached the decision therein to each of the other decisions. J.A. 21, fn. 3; 23, fn. 2; 26, fn. 2. For the significance of the Board's citation of the *International Harvester, East Moline* case, see p. 11, *infra*.

tioner's existing Nabisco contract in violation of the Act and without due process of law (J.A. 14).[3]

Respondents moved to dismiss the complaint and the district court (Holtzoff, J.) granted their motion on the authority of *DePratter v. Farmer*, 98 U.S. App. D.C. 74, 232 F. 2d 74 (J.A. 230, 232).

On appeal, the Court of Appeals for the District of Columbia Circuit affirmed, stating without discussion that the district court was "clearly right" in holding "that the Board's determination that the elections were warranted in the interest of stable bargaining relationships was within allowable limits of the Board's discretion and was not prohibited by § 9(c)(2)." (*Infra*, p. 12a).

REASONS FOR GRANTING THE WRIT

1. The court below was in error in failing to recognize that this case, as shown on the face of the complaint, clearly involves respondents' "departure from statutory requirements [and] from those of due process." See *Inland Empire District Council, etc. v. Millis*, 325 U.S. 697, 700. Under the Court of Appeals' own decision (*Leedom v. Kyne*, 249 F. 2d 490), affirmed by this Court (358 U.S. 184), the district

[3] The complaint also alleged that the respondents' unit finding—that single plant units were appropriate—was arbitrary and capricious under the Board's own rules of decision and that the unit finding constituted a further instance of respondents' discrimination against petitioner in violation of section 9(c)(2) of the Act and of the Fifth Amendment (J.A. 10-13, 27-39, 43-49). Cf. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260; *Service v. Dulles*, 354 U.S. 363.

Jurisdiction of the district court was invoked under 28 U.S.C. 1337, 2201, and 2202 and District of Columbia Code (1951 ed.) secs. 11-305 and 11-306 (J.A. 4-5).

court was in error in dismissing the complaint, and should have been reversed by the court below.

Nor was respondents' "unlawful action" of such a nature as requires great "ingenuity of counsel" to find. See *Leedom* v. *Kyne*, dissenting opinion, 358 U.S. 184, 191, 195. The command of section 9(c)(2) of the Act is clear and plain for all who will see:

> "In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought * * *."

This statutory expression of the constitutional assurance of equal protection of the law was flouted by respondents in the Nabisco decisions here attacked. See pp. 10-14, *infra*.

The purpose of section 9(c)(2), inserted in the Act by the Taft-Hartley amendments of 1947, was to require the Board to apply in representation proceedings the same rules of decision and otherwise to accord the same treatment to independent labor organizations as to unions affiliated with federations like the AFL-CIO. The language of the section is clear as to this, and its legislative history, revealed in the Senate and House Reports and in the House Conference Report, is unequivocal to the same effect.[4] Debate on the

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[4] The Senate and House bills contained language substantially like that of section 9(c)(2) as finally enacted. See H.R. 3020, section 9(f)(4), and Senate Bill 1126, section 9(c)(2) (80th Cong., 1st Sess.). House Conference Report 510 on H.R. 3020, June 6, 1947, explained, at page 48, that "the Conference Agreement contains a provision having the same force and effect" as the provisions in the original versions "requiring the Board to treat independent unions in the same manner in which it treats unions which are affiliated with or constitute units of labor organizations,

floor of both Houses of Congress on the Taft-Hartley bill also shows that section 9(c)(2) was designed to protect independent, unaffilfated labor unions from discrimination by a labor board inclined to prefer unions affiliated with one of the two leading labor federations, the American Federation of Labor or the Congress of Industrial Organizations, now merged into one giant federation known as the "AFL-CIO". Thus, Representative Hartley, for whom the final bill was named in part, told the House that:

> "This bill also protects the existence of labor organizations which are not affiliated with one of the National Federations." 93 Cong. Rec. 3533, April 15, 1947.

On the Senate side, Senator Ball, a proponent of the measure, stated that the bill

> "requires that independent unions and unions affiliated with national and international organizations must be treated in the same way by the NLRB, which now is so biased in favor of the two great federations, that it has one rule for unions belonging to those federations and a completely different and much harsher rule for deal-

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national or international in scope . . ." See id, page 40. Also see Senator Taft's explanation, 93 Cong. Rec. 6601, June 5, 1947. In accord is House Report No. 245, on H.R. 3020 (80th Cong., 1st Sess.), April 11, 1947, which states the objectives of the original House bill:

> "It *protects* the existence of *labor organizations* which are *not affiliated* with one of the national federations." Page 5. [Emphasis supplied] Also, pp. 7, 38.

Similarly, Senate Report No. 105 on S. 1126, April 17, 1947, explained the Senate Bill's purpose as being "that independent and affiliated unions be accorded similar treatment . . ." P. 25

ing with independent unions." 93 Cong. Rec. 5147, May 12, 1947.[5]

Although those pro and con the Taft-Hartley bill disagreed as to whether the Board had been discriminating against truly independent unions and as to whether the equal-treatment requirement of 9(c)(2) would give some encouragement and protection to so-called company unions, both sides were in agreement as to what 9(c)(2) meant. The simple and general "due process" language of section 9(c)(2)—that representation case rules shall be the same regardless of "identity"—was a congressional command that the same rules of decision apply to independent, unaffiliated unions and to AFL-CIO affiliates alike. The provision, therefore, prohibits the Board, in making its decision in a representation proceeding, from relying on the identity of a party to that proceeding and from applying different rules and reaching different results depending upon petitioner's affiliation or nonaffiliation with the AFL-CIO.

Yet in the instant Nabisco cases respondents did the very thing which the Congress, in section 9(c)(2), explicitly proscribed. They held that there was a

[5] Respondents' argument in the court below, that the sole purpose of section 9(c)(2) was to stop the Board from applying more stringent remedial orders under section 8 of the Act against company-dominated "independent" unions than against unions affiliated with the AF of L or CIO, is completely without merit. Another specific amendment to the Act aimed at Board discrimination in this area is to be found in section 10(c), 29 U.S.C. 160(c), a section dealing with remedying unfair labor practices. On the other hand, section 9 of the Act is concerned only with representation proceedings. Surely the Congress did not amend section 9, by adding 9(c)(2), in order to modify Board practice under section 8 or 10.

question of representation within the meaning of section 9(c)(1) (29 U.S.C. 159(c)(1)) despite petitioner's current Nabisco contract asserted as a bar to representation proceedings. Respondents based this holding upon the Board's so-called *Lawrence Leather* rule.[6] This rule, as delineated in *A. C. Lawrence Leather Company*, 108 NLRB 546 (1954), provides:

[6] The only authority cited by respondents as a basis for their holding that there was no contract bar to the Nabisco elections was "*International Harvester Company, East Moline Works*, 108 NLRB 600, ftn. 11" (J.A. 18, fn. 3). In that case, which was merely another application of the *Lawrence Leather* rule, the Board held:

> "Accordingly where the expulsion of a labor organization from its parent has been followed by disaffiliation at the local level for reasons related to the expulsion, as in the instant case, the Board will find that schism exists which warrants directing an immediate election notwithstanding the existence of a contract which would otherwise bar a determination of representatives. Accordingly, we find that the contract between the Employer and the Intervenors . . . does not bar this proceeding.[11]" 34 LRRM at p. 1067.

And footnote 11 to this statement, cited by respondents as authority for finding no contract bar in the Nabisco proceedings, reads as follows:

> "[11] *A. C. Lawrence Leather Company*, 108 NLRB No. 88; 34 LRRM 1022.
>
> "The Employer contends that the schism doctrine should not be applied in the instant case because the disaffiliation was not coextensive with all the plants covered by its master agreement with UE. However, where, as here, the master agreement covers a number of units for which bargaining agents have been separately certified, it is sufficient that the disaffiliations be coextensive with a single one of the several bargaining units covered by the master agreement. *General Electric Company, Appliance Service Center*, 96 NLRB 566. As each of the disaffiliations in the instant case occurred in such a unit, we find no merit in this contention . . ."

"Where, therefore, a local group disaffiliates from a union expelled by its parent, for reasons related to the expulsions, as in this case, the Board will find that a schism exists which warrants directing an immediate election notwithstanding the existence of a contract with the union suffering the schism which would otherwise bar a determination of representatives." 108 NLRB, at 549.

As an independent commentator, Professor Clyde W. Summers of Yale Law School, has put it:

"* * * in *A. C. Lawrence Leather Co.* a special opening was made in the contract bar doctrine for [the left wing union] cases. Where 'a local group disaffiliates from a union expelled by its parent for reasons related to the expulsion,' the Board will direct an immediate election notwithstanding the existence of a contract. Through this gate, groups seceding from the ousted internationals paraded freely to elections, while other seceding groups struggled to surmount the contract bar.

* * * * *

"The double standard is self-evident.

* * * * *

"With the first BCW cases, the Board began to restudy its schism rules. Not surprisingly, the newly stated rules in *Hershey Chocolate Corp.*[7]

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[7] 121 NLRB No. 124, Sept. 18, 1958. It should be noted that the Hershey Chocolate rules, by which respondents' counsel sought in the court below to justify respondents' actions in the instant Nabisco cases, were promulgated some two and a half months after the Nabisco decisions were handed down.

Other independent commentators have thought it significant that "the *Hershey* decision was promulgated during the pendency before the District of Columbia Circuit of [the instant] case questioning the constitutionality of the Board's *Lawrence Leather*

hold wide the door to an election for locals seceding from the corrupt internationals which have been expelled from the AFL-CIO. At the same time, locals seceding from other internationals may find the door locked." Summers, *Union Schism in Perspective: Flexible Doctrines, Double Standards, and Projected Answers*, 45 Va. L. Rev. 261, 271-73 (1959).

It is this *Lawrence Leather* double standard, prohibited by both the Constitution and section 9(c)(2) of the Act, that the respondents applied in striking down petitioner's 17-plant Nabisco contract as a bar to elections and in directing elections to be held at some of those plants. In sum, respondents, in the actions here attacked, directed representation elections in certain biscuit and cracker plants of the National Biscuit Company solely because petitioner, the recognized contractual bargaining agent for all 17 such plants of the Company, was affiliated with a union which had been expelled from the AFL-CIO, whereas the groups seeking the elections claimed allegiance to that federation. Had the situation been reversed

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schism doctrine." Note, *The Schism Doctrine*, 45 Va. L. Rev. 211, 237 (1959). Indeed, *Hershey*, after having been held under advisement by the Board for over half a year, was promulgated by respondents on the very day that respondents' counsel filed their brief in the court below expounding *Hershey* doctrine in defense of the respondents' earlier application of *Lawrence Leather* in the Nabisco cases.

Regarding *Lawrence Leather* and *Hershey*, Professor Summers comments that "The Board • • • has in the past tailored its schism rules to fit the current fashions. In *Hershey Chocolate*, it has designed new rules so closely cut that they seem to fit the present needs of the AFL-CIO better than the Board's own basic premises." Summers, *Union Schism in Perspective: Flexible Doctrines, Double Standards, and Projected Answers*, 45 Va. L. Rev. 261, 274 (1959).

(i.e., had petitioner remained an AFL-CIO union and the schism otherwise been the same), no elections would have been directed and petitioner would have continued as the sole multiplant bargaining agent for the duration of its contract with Nabisco. Thus the Board did the very thing which the Congress, in 9(c)(2), explicitly condemned.

This being so, *Leedom* v. *Kyne, supra,* gives petitioner the right to judicial review of respondents' illegal actions, and the court below was in error in not according petitioner that right.

2. Plainly, the Board has felt little or no duty to dispense equal justice because, where it has applied the *Lawrence Leather* rule, invariably the victim has been a union which had been subjected to adverse publicity, and the beneficiary of the discriminatory rule was in the favor of the politically powerful labor federation which had expelled either the victim of the schism or its parent. We have demonstrated above, however, that in the light of the unambiguous statutory language of section 9(c)(2) and of its legislative history, respondents cannot validly find, as they did in these Nabisco cases, that the existence of a question concerning representation depends upon expulsion of petitioner's affiliate by the AFL-CIO. Such a finding not only is a reliance upon "identity" forbidden by 9(c)(2), but also constitutes an unlawful delegation of authority, vested by statute in the Board, to a private organization, the AFL-CIO.

3. Moreover, respondents exceeded their statutory authority by directing elections during the term of a valid subsisting agreement between petitioner and

Nabisco.* Early in its history the Board ruled that no representation question is raised upon the filing of an election petition during the term of a collective bargaining agreement of reasonable length where such agreement does not defeat "the policies and purposes of the Act." *Superior Electrical Products Co.*, 6 NLRB 19, 22 (1938). This rule, known as the "contract bar" rule, while thus enunciated by the Board in *Superior Electrical Products*, is actually a policy declared by the Act itself as if "written into the Statute" in *haec verba*. L. Hand, C. J., in *Fay* v. *Douds*, 172 F. 2d 720, 724 (C.A. 2).

This Court has repeatedly recognized the Board's lack of authority to set aside labor contracts unless such contracts in themselves thwart some policy of the Act. *Consolidated Edison Company* v. *N.L.R.B.*, 305 U.S. 197, 235-37; *N.L.R.B.* v. *Sands Manufacturing Company*, 306 U.S. 332, 342; *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332, 338-40; *N.L.R.B.* v. *Rockaway News Supply Company*, 345 U.S. 71. As most recently stated by this Court:

> "* * * the Board has no general commission to police collective bargaining agreements and strike down contractual provisions in which there is no element of an unfair labor practice." *Local 1976, United Brotherhood of Carpenters and Joiners of America* v. *N.L.R.B.*, 357 U.S. 93, 108.

How, then, can the Board in these Nabisco cases have carved five plants out of a valid, subsisting col-

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*This is entirely apart from the question of respondents' *Lawrence Leather* discrimination against petitioner whereby, because of petitioner's "identity", its Nabisco contract was held no bar to elections.

lective bargaining contract covering 17 Nabisco plants? There is not here a hint of unfair labor practice. Nor in the Nabisco decisions here attacked (J.A. 17-27) has the Board said a single word about the validity of the contract itself, nor found the contract in any way inconsistent with the objectives or policies of the Act.

Such arbitrary and capricious obliteration of the Nabisco 17-plant contract by the Board constitutes destruction of petitioner's validly acquired contract rights and the taking of its property without due process of law within the meaning of the Fifth Amendment. *Lynch* v. *United States*, 292 U.S. 571, 579; *John McShain, Inc.* v. *District of Columbia*, 92 U.S. App. D.C. 358, 360, 205 F. 2d 882, 884, cert. den. 346 U.S. 900.

4. The questions presented are important.

They are important to the administration of the National Labor Relations Act.

It is important for labor unions to know whether section 9(c)(2) means what it says or, despite its provisions, whether the Act permits the Board to have one rule for unions affiliated with the AFL-CIO and another rule for unions not so affiliated. The error of the court below lay in its failure to see that the Board's decisions in these Nabisco cases as clearly flout the Act as did the Board's action involved in *Leedom* v. *Kyne, supra*. The Board's application of its *Lawrence Leather* rule has penalized petitioner for its affiliation with an organization expelled from the AFL-CIO and thus has effectively denied to the Nabisco employees involved their "right to self-organi-

zation, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing" guaranteed by section 7 of the Act, 29 U.S.C. 157. The court below erred in sanctioning the Board's requirements that employees, in order fully to exercise their rights under the Act, must do so only through labor organizations adhering to and in conformity with the presently dominant labor federation, the AFL-CIO. This is a shocking subversion of a statute and of the Constitution "to fit the current fashions." Summers, op. cit., 45 Va. L. Rev. 261, 274. A more important question to the continued existence of a voluntary labor movement can hardly be imagined.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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